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In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
PETITIONERS

v.

NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

A provision of the Immigration and Nationality Act, 8 U.S.C. 1252(a)(1), authorizes the release of aliens, pending determination of deportability, on bonds containing "such conditions as the Attorney General may prescribe." The question presented is whether that provision prohibits promulgation of a rule generally requiring that release bonds contain a condition forbidding unauthorized employment pending determination of deportability.

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are the Immigration and Naturalization Service; Gene McNary, Commissioner of the Immigration and Naturalization Service; and Richard Thornburgh, Attorney General of the United States. Respondents, plaintiffs below, are National Center for Immigrants' Rights, Inc.; American Friends Service Committee; El Rescate ("The Rescue"); Central American Refugee Center; El Concilio Manzo; Williamette Valley Immigration Project; Southern California Ecumenical Council; Centro Presente, Inc.; Tucson Ecumenical Council; Hermandad Nacional Mexicana; Coalition for Visas and Rights for the Undocumented; Centro Para Immigrantes de Houston; International Institute of Boston; Center for Immigrants Rights; Imperial Valley Immigration Project; United Automobile, Aerospace and Agricultural Implement Workers of America Local 645; and the following individuals: Santos Adalberto Lopez-Duran, Julio Fernando Lorine-Garcia, Raphael Antonio Perez, Raul Armando Marroquin, Ricardo Delgado Osegueda (or Oseguena), Mirza Odilia Hernandez Diaz, Maximiliano Martinez Oriana (or Orellana), Rosa Maria Tovar Rivas (or Tobar Rivas), Dennis Gillermo Venegas, Antonio Mendoza Romero, Migel (or Miguel) Angel Gomez Vasquez (or Gomez-Vasquez), Fidel Angel Henriquez Duran, Daniel Antonio Garcia Reyes, Ana Berta Martinez, Dionisio Navarette Marlos (or Merlos), and Jane Doe I (an alien who claims to be deterred from filing for benefits with INS because of fear that the regulations at issue would result in her indefinite detention).

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-60a, is reported at 913 F.2d 1350. An earlier opinion in the same appeal, regarding an issue of appellate jurisdiction, Pet. App. 61a-65a, is reported at 892 F.2d 814. The opinion of the district court, Pet. App. 66a-70a, is unreported.

Several opinions were issued by the courts below prior to this Court's 1987 order, which granted our previous petition for certiorari, vacated the judgment below, and remanded the case to the court of appeals. See 481 U.S. 1009. The court of appeals decision vacated by this Court, Pet. App. 71a-80a, is reported at 791 F.2d 1351. The district court order from

which that appeal was taken, Pet. App. 81a-95a, is reported at 644 F. Supp. 5. An earlier opinion of the court of appeals affirming the issuance of a preliminary injunction, Pet. App. 96a-108a, is reported at 743 F.2d 1365. The district court's opinion granting the preliminary injunction, Pet. App. 109a-118a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1990. On November 23, 1990, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 5, 1991 (a Saturday). The petition for certiorari was filed on January 7, 1991, and was granted on April 1, 1991, limited to Question 2 presented by the petition.[1] J.A. 59. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 103(a), 212(a)(14), 241(a)(1), and 242(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1103(a), 1182(a)(14), 1251(a)(1), and 1252(a)(1), are reproduced at Pet. App. 119a-122a. 8 C.F.R. 103.6 and 8 C.F.R. 274a.12 are reproduced at Pet. App. 122a-136a. The notice promulgating the regulations at issue here, 48 Fed. Reg. 51,142-51,144 (1983), is reproduced at Pet. App. 137a-149a.

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[1] Question 1 presented a challenge to the jurisdiction of the district court in this case. In our reply brief at the petition stage, we withdrew that question in light of this Court's intervening decision in *McNary* v. *Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991).

STATEMENT

Respondents—non-profit organizations, a local union, and individuals in deportation proceedings—filed an action in 1983 challenging a regulation of the Attorney General. The regulation provides that when an alien is released from custody pending deportation or exclusion proceedings, the bond obtained to secure the alien's release must in most cases include a condition forbidding unauthorized employment. Ten days after the regulation took effect, the district court issued a nationwide preliminary injunction barring its enforcement. The court of appeals affirmed, subject to a certification of a nationwide class. On remand, the district court certified a nationwide class and made the nationwide injunction permanent. The court of appeals affirmed the permanent injunction.

This Court granted the government's petition for a writ of certiorari, vacated the lower court's judgment, and remanded the case for further consideration in light of the Immigration Reform and Control Act of 1986 (IRCA). On remand, the district court reentered its nationwide injunction, and a divided panel of the court of appeals affirmed. This Court has again granted a writ of certiorari.

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, gives the Attorney General wide discretion to impose conditions on bonds securing aliens' release pending the outcome of deportation proceedings. Section 242(a)(1) of the Act (codified at 8 U.S.C. 1252(a)(1)) provides that aliens in deportation proceedings may be released on bond "with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe."

In 1983, the Immigration and Naturalization Service, to which the Attorney General has delegated his authority under 8 U.S.C. 1252(a)(1), see 8 C.F.R. 2.1, proposed a regulation requiring aliens to refrain from unauthorized employment as a condition of the bonds obtained to secure their release. The proposed regulation was to replace the prior procedure, which INS had found too cumbersome, under which district directors had to obtain prior approval from INS regional commissioners before imposing a condition against unauthorized employment in a release bond. 8 C.F.R. 103.6(a)(2)(ii) (1983). The proposed regulation included a condition prohibiting unauthorized employment in every "appearance and delivery bond in connection with a deportation proceeding or bond posted for release of an alien in exclusion proceedings, unless upon application by the alien the District Director determines that employment is appropriate" in light of certain specified factors. 48 Fed. Reg. 8820-8821 (1983). INS explained that the proposed regulation was "consistent with the general principle that employment of aliens in the United States is to be strictly controlled to safeguard the interest of U.S. citizens and permanent resident aliens." *Id.* at 8820.

In November 1983, INS published a revised, final regulation.[2] An accompanying explanation clarified

[2] The final regulation set forth factors to be considered in the exercise of the district directors' discretion whether to grant work authorization, including the safeguarding of employment opportunities for American citizens, prior violations of the immigration laws by the alien, whether an American citizen or lawful permanent resident is dependent on the alien for support, and whether there are other equities that should be considered. See 48 Fed. Reg. 51,144 (1983) (8 C.F.R. 103.6(a)(2)(iii) and 8 C.F.R. 109.1(b)(8)), Pet. App. 123a, 148a. The authority given to district directors under the regulation is in addition to district directors' preexisting authority, 8 C.F.R. 109.1(b)(1)-(7) (1983), to grant work authorization to aliens who are in certain specified statuses or who have applied for or been granted certain specified benefits.

During the pendency of this litigation, various regulations regarding alien work authorization—including 8 C.F.R. 109.1—have been amended and recodified at 8 C.F.R. 274a.12. Pet. App. 127a-136a. Subsections (a) and (b) of this new section list the immigration statuses that automatically convey work authorization. Subsection (c) sets forth provisions, such as the one at issue here, under which aliens may apply for work authorization. The specific provision regarding temporary work authorizations pending deportation proceedings (former 8 C.F.R. 109.1(b)(8) (1984)) now appears, with some elaboration as to the factors to be considered in granting such relief, as 8 C.F.R. 274a.12(c)(13). Pet. App. 135a-136a.

that the regulation would not diminish any employment authorization that an alien already had, since the regulation bars only "working without authorization"—*i.e.*, "unauthorized work [that] is a continuing violation of the immigration laws." 48 Fed. Reg. 51,142 (1983), Pet. App. 139a. The regulation therefore would *not* affect citizens and permanent resident aliens, who have authorization to work by virtue of their status. 48 Fed. Reg. 51,143 (1983), Pet. App. 142a-143a. Nor would the regulation affect asylum applicants who had filed nonfrivolous applications, since another regulation, 8 C.F.R. Pt. 208 (see also 8 C.F.R. 274a.12(c)(8)), governs employment authorization for such aliens. The primary effect of the regulation, INS explained, is to impose on aliens who enter the United States illegally, and who are *not* authorized to work, the burden of seeking employment authorization from the district director. 48 Fed. Reg. 51,143 (1983), Pet. App. 141a.

By placing the burden on these aliens, INS intends to remove an economic incentive for illegal entry, and also to remove an incentive to delay deportation proceedings when an alien is apprehended. Acknowledging that fewer bonds might be written and that more aliens might be detained under the new regulation, INS stated that those were acceptable costs in order to safeguard employment for U.S. citizens and permanent resident aliens. 48 Fed. Reg. 51,143 (1983), Pet. App. 141a.

2. On December 6, 1983, one day before the new regulation was to take effect, respondents filed this action challenging its validity on a variety of statutory and constitutional theories.[3] Ten days later, the district court issued a nationwide preliminary injunction prohibiting implementation of the regulation. Pet. App. 109a-118a. The basis for this ruling was that respondents had a "fair chance" of success on their arguments that 8 U.S.C. 1252(a)(1) does not authorize a condition unrelated to ensuring the alien's appearance at deportation hearings and that the regulation deprives aliens of their due process rights by denying them the right to work until deportability is finally determined. Pet. App. 115a. On

[3] Plaintiffs named in the original complaint were 13 nonprofit organizations providing free legal services to aliens with immigration problems, a local United Auto Workers Union affiliate, six named aliens held in detention, and one unnamed alien who claimed to be deterred from filing for benefits by fear that the new regulation would result in indefinite detention. J.A. 18-23. In an amended complaint, one of the alien plaintiffs held in detention was dropped and ten additional alien plaintiffs were added. J.A. 31-41. Four of the additional plaintiffs alleged that a "no-work" condition had been included in their release bonds; six alleged that they were then in detention.

appeal, the court of appeals affirmed in part and reversed in part. *Id.* at 96a-108a. The court held that a nationwide injunction was improper in the absence of class certification, but affirmed the injunction with respect to the named plaintiffs, on the ground that the respondents had a "fair chance" of succeeding on the merits of their statutory argument. *Id.* at 107a. The court remanded for further proceedings on the issue of class certification, and for proceedings on respondents' request for permanent relief. *Id.* at 107a-108a.

On remand, the district court certified a nationwide class and entered a nationwide permanent injunction. Pet. App. 81a-95a. The sole ground for the district court's ruling was that the regulation exceeded the statutory authority granted in 8 U.S.C. 1252(a)(1). Pet. App. 84a, 95a. The court acknowledged that a condition prohibiting unauthorized employment does "further the broad purposes of the Immigration and Nationality Act." Pet. App. 85a. It also acknowledged that the plain language of the statute "appears on its face to grant a great deal of discretion to the Attorney General in his decision on whether to release an alien under bond." *Id.* at 87a. But it nevertheless held that bond conditions must be limited to ensuring the appearance of the alien at deportation proceedings. *Id.* at 88a-89a, 92a. Quoting the earlier court of appeals opinion, the district court relied on this Court's opinion in *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 892-893 (1984), to characterize unauthorized employment by aliens as only a "peripheral concern" of the immigration laws. Pet. App. 92a. The court further faulted the regulation for "inherently preclud[ing] any individualized determination," *id.* at 85a, and held that "the discre-

tion of the Attorney General does not extend to the blanket imposition of a no-work condition on all aliens who are released on bond," *id.* at 95a.

The court appeals affirmed. Pet. App. 71a-80a. Like the district court, it acknowledged the breadth of the statutory language, but held that "legislative history, prior legislation, and case law limit the allowable conditions to those that tend to insure the appearance of the alien in future proceedings." *Id.* at 77a. The court reiterated the view, expressed in its earlier opinion, that the INA is not primarily concerned with illegal work by aliens and that such a purpose would not support the no-unauthorized-work condition on release. *Id.* at 79a-80a. The court of appeals also endorsed the district court's reasoning that the Attorney General must proceed by "individualized determinations rather than the imposition of a blanket condition." *Id.* at 80a.

The government petitioned this Court for a writ of certiorari. In the meantime, Congress had enacted the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. In opposing the petition, respondents argued that enactment of IRCA would make review of the regulation "academic." 86-1207 Br. in Opp. 10 (filed Mar. 31, 1987). This Court issued an order granting the petition, vacating the judgment of the court of appeals, and remanding the case "for further consideration in light of the Immigration Reform and Control Act of 1986." 481 U.S. 1009, 1009-1010 (1987).

The court of appeals then remanded the case to the district court. That court reaffirmed its grant of summary judgment and declined to revise its assessment of the legal issues in light of IRCA. Pet. App. 66a-70a. The court expressed the view that IRCA made the question at hand "a more difficult one," *id.*

at 70a, but adhered to its earlier opinion that the legislative history of 8 U.S.C. 1252(a)(1) limits permissible release conditions to those "aimed at obtaining an undocumented worker's appearance at future immigration proceedings," Pet. App. 68a. The court also reiterated its criticism that the regulation was a "blanket no-work provision that is devoid of individualized determinations as to employment status." *Id.* at 69a.

A divided panel of the court of appeals affirmed. Pet. App. 1a-60a.[4] In light of an intervening ruling by another panel of the same court, *Flores* v. *Meese*, 906 F.2d 396, amended, 913 F.2d 1315 (9th Cir. 1990), withdrawn on grant of reh'g en banc, No. 88-6249 (Nov. 19, 1990), the majority was constrained to recognize that bond conditions are not limited to "the *sole* purpose of ensuring appearance at deportation hearings." Pet. App. 22a-23a. By a somewhat modified and lengthier route, however, the court of appeals arrived at essentially the same result as it had prior to this Court's remand. After distinguishing the circuit precedent noted above, the panel majority used a two-step process to arrive at the conclusion that 8 U.S.C. 1252(a)(1) does not permit release bonds to contain a condition forbidding unauthorized employment. First, after reviewing earlier INS practice and the policies of IRCA, the majority concluded that the Attorney General cannot use detention to prevent aliens from working without authorization. Pet. App. 47a; see also *id.* at 35a (Attorney General has "no authority for *detention* in relation to unauthorized employment"). Second, the majority held that, "where there is no power

[4] Before ruling on the merits of this appeal, the court of appeals issued an opinion rejecting respondents' suggestion that it lacked appellate jurisdiction. Pet. App. 61a-65a.

to detain, conditions must be related to ensuring the alien's appearance." *Id.* at 54a. The court also relied heavily on the conclusion that bond conditions must be based on individualized administrative proceedings rather than on application of a general rule. The majority discussed at length prior decisions dealing with the need for such individualized determinations in cases of aliens detained as security risks, Pet. App. 25a-33a, and concluded that bond conditions "must be based on specific facts regarding the individual" in question, *id.* at 57a. It accordingly ruled that the "blanket condition" represented by the rule at issue would not pass muster, in its view, "even if unauthorized employment were grounds for detention." *Id.* at 57a-58a.

Judge Trott dissented. Pet. App. 58a-60a. Viewing the proper analysis as "uncomplicated," he found that the bond conditions INS seeks to impose by rule are rationally related to "[a]n unmistakable purpose of the [INA]"—*i.e.*, "to preserve jobs for American workers." *Id.* at 58a (quoting *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. at 893). He also reasoned that this purpose was "fortified" by IRCA, and characterized the majority's attempt to find support for its position in IRCA as "thoroughly unpersuasive." *Id.* at 59a. Because the regulation would help prevent continued illegal employment by aliens awaiting deportation proceedings, Judge Trott concluded that "the majority opinion improperly invades the province of the Attorney General." *Ibid.*

SUMMARY OF ARGUMENT

1. Section 242(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1252(a)(1), grants the Attorney General wide discretion to require "such conditions as [he] may prescribe" on bonds used to

obtain an arrested alien's release pending deportation proceedings. The unqualified language of the statute offers no support for the court of appeals' holding that bond conditions are limited to those related to ensuring the alien's appearance for deportation hearings. To the contrary, Congress replaced a provision permitting release on bond "conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody." 8 U.S.C. 156 (1946). The committee reports explaining this change, which now appears in Section 1252(a)(1), indicate that the Attorney General would have "full discretion" and "untrammeled authority" to impose "such conditions or terms as he sees fit." H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950).

The regulation at issue here is well within the Attorney General's wide discretion under Section 1252(a)(1). Since unauthorized employment violates the INA (see, *e.g.*, 8 U.S.C. 1182(a)(14)), forbidding unauthorized work as a condition of an alien's release furthers a core purpose of the immigration laws. Indeed, Congress has often stated—and this Court has recognized—that the preservation of employment opportunities for American workers is one of the foremost purposes of the INA. Congress reiterated this point dramatically in 1986, when it passed the Immigration Reform and Control Act. A release bond condition forbidding unauthorized work protects jobs for United States citizens and lawful resident aliens by deterring illegal entry and reducing incentives to prolong deportation proceedings.

The "no unauthorized work" regulation is based on a long-standing statutory interpretation that merits great deference. Since he first addressed the issue,

the Attorney General has maintained that employment concerns are a proper subject of bond conditions. Although the regulation represents a change in the way his statutory authority is exercised, there has been no change in the Attorney General's view of the scope of that authority.

2. The court of appeals erred in holding that the "no unauthorized work" regulation is an improper "blanket" condition that violates a requirement of "individualized determinations." First, the court mischaracterized the regulation, which contemplates two types of individualized determinations for arrested aliens: a determination whether the alien holds a status entitling him to work, and, if he does not, a determination whether he should nevertheless be granted discretionary work authorization. The discretionary relief referred to in the regulation takes account of a broad range of factors, including hardship on the alien and his family and his likelihood of eventually achieving legal status.

Second, the statute lends no support to the court of appeals' holding that bond conditions can be imposed only in an individual determination regarding the potentially harmful effects of the alien's release. The statute states that the Attorney General may impose "such bond conditions as [he] may prescribe," without indicating whether such conditions are to be "prescribed" in individual hearings or by rule of general application.

Third, even where (unlike here) statutes specifically require individual hearings in contested cases, this Court has recognized the authority of administrative agencies to resolve issues of general applicability through rulemaking. Those precedents support the Attorney General's decision to decide by rule that, in the absence of special circumstances, aliens

in deportation proceedings who lack work authorization should not be permitted to seek employment while released on bond. To compel INS to address such policy issues in each bond proceeding would be pointless, and nothing in the statute requires such a result.

ARGUMENT

I. THE IMMIGRATION AND NATIONALITY ACT AUTHORIZES THE ATTORNEY GENERAL TO REQUIRE THAT, PENDING THE OUTCOME OF AN ARRESTED ALIEN'S DEPORTATION PROCEEDING, ANY RELEASE BOND MUST CONTAIN A CONDITION FORBIDDING UNAUTHORIZED EMPLOYMENT

Section 242(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1252(a)(1), authorizes the Attorney General to impose "such conditions as [he] may prescribe" in release bonds for aliens awaiting a final decision in deportation proceedings. The unqualified language of the statute and the legislative history of its adoption leave no doubt that Congress intended to grant the Attorney General broad discretion in this area. Barring unauthorized employment through conditions in release bonds falls comfortably within that discretion.

A. The Immigration And Nationality Act Gives The Attorney General Wide Discretion To Impose Conditions In Bonds Obtained To Secure Aliens' Release

1. Congress could not have made any clearer the breadth of the Attorney General's discretion regarding release conditions:

> Pending a determination of deportability * * *, [an] alien may, upon warrant of the Attorney General, be arrested and taken into custody.

> * * * Any such alien taken into custody may, *in the discretion of the Attorney General* and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond * * * *containing such conditions as the Attorney General may prescribe*; or (C) be released on conditional parole. But such bond or parole * * * *may be revoked at any time by the Attorney General, in his discretion*, and the alien may be returned to custody * * * and detained until final determination of his deportability.

8 U.S.C. 1252(a)(1) (emphasis added). If the Attorney General has probable cause to believe that an alien is deportable, he may arrest that alien and take him into custody. Release from custody is within the Attorney General's discretion. If the Attorney General authorizes release on bond, Section 1252(a)(1) expressly provides that the bond may contain "such conditions as the Attorney General may prescribe." Plainly, those conditions may be designed to serve any of the policies of the Immigration and Nationality Act.[5]

The court of appeals effectively read "such conditions as [he] may prescribe" to restrict conditions in release bonds to those necessary to ensure aliens' appearance at deportation hearings. Initially, the court

[5] The Attorney General's wide discretion in carrying out the policies of the INA is further reflected in 8 U.S.C. 1103(a) (emphasis added):

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens * * *. *He shall establish* such regulations; prescribe *such forms of bond*, reports, entries, and other papers; issue such instructions; and perform such other acts *as he deems necessary for carrying out his authority under the provisions of this chapter* * * *.

adopted that reading directly, holding that the Attorney General can impose only those bond conditions "which tend to insure the alien's appearance at future deportation proceedings." Pet. App. 80a; see *id.* at 68a-69a, 88a-89a. In its most recent opinion, the court reached exactly the same conclusion by a more circuitous route. First, the court held that "[u]nauthorized employment has never been held to justify detention." Pet. App. 57a-58a;[6] see also *id.* at 48a. Second, the court held that, "where there is no power to detain, [bond] conditions *must* be related to ensuring the alien's appearance." *Id.* at 54a (emphasis added).

The court of appeals' edict that conditions on release bonds are limited to those related to ensuring appearance at deportation hearings finds no support whatever in the text of 8 U.S.C. 1252(a)(1). The unqualified language of that Section contrasts markedly with the language of other provisions that *do* limit the permissible conditions of release bonds. In the provisions governing bonds in criminal cases, for example, Congress specifically enumerated both the permissible conditions of release and the purpose to be served by those conditions. See 18 U.S.C. 3142(c), (g), and (h).[7] And in the very context of release on

[6] As noted in our reply brief at the petition stage, the bottom two lines at Pet. App. 57a are reversed. See 913 F.2d at 1374.

[7] Notably, Congress has determined that the release bond of a person charged with a crime must be conditioned on the person's not committing any crime while on release. 18 U.S.C. 3142(c)(1). Although Congress has not *required* that the bond of a person charged with an immigration violation must condition release on the person's not committing further immigration violations, the absence of such a requirement is hardly a basis for concluding that the broad language

bond pending deportation proceedings, Congress at one time limited the allowable conditions to those designed to ensure appearance. 8 U.S.C. 156 (1946). The repeal of that provision, and the substitution of the current provision, confirms Congress's intent to authorize the Attorney General to impose any conditions reasonably related to the purposes of the INA.

2. No other provision of the INA supports the court of appeals' restrictive reading of 8 U.S.C. 1252(a)(1). Respondents have argued that a comparison of subsection (a)(1) with subsection (d) supports the court of appeals' decision, because subsection (d)—which applies to persons whose deportations could not be effected within six months of the final deportation order—specifically permits the imposition of "reasonable written restrictions on [the alien's] conduct or activities." See, *e.g.*, Br. in Opp. 15, 20-21.

Contrary to that contention, the differences between subsections (a)(1) and (d) reflect the fact that they address different phases of the deportation process. Subsection (a)(1), at issue here, addresses the phase between initiation and completion of deportation proceedings. It permits the Attorney General to detain persons in such proceedings, or to release them on bond under "such conditions as [he] may prescribe." [8] Subsection (d) addresses situations

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of 8 U.S.C. 1252(a)(1) prohibits the Attorney General from imposing a limited, specific condition of this kind.

[8] Subsection (b) addresses the conduct of deportation proceedings, and does not affect issues of detention or supervision. Subsection (c) addresses the six-month period following a final deportation order, during which time the Attorney General retains the same authority to detain or to impose conditions as under subsection (a)(1).

where the Attorney General does not effect deportation within six months following a final deportation order—a situation that may arise when an appropriate country will not accept a deportable alien. Six months after a final deportation order, the alien may no longer be detained; he is thereafter subject only to "supervision," which may include "reasonable written restrictions" on "conduct or activities." Since aliens may remain subject to "supervision" under subsection (d) indefinitely, see *United States* v. *Witkovich*, 353 U.S. 194, 201 (1957),[9] Congress may well have perceived the need for more specificity with respect to the Attorney General's authority than in the case of a release bond (under subsection (a)(1)) that is tied to a pending proceeding. Thus, there is no inconsistency between the two provisions.

Nor is there merit to respondents' argument (see Pet. App. 46a-47a; Br. in Opp. 22-23) that the At-

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[9] The court of appeals erred in relying on *Witkovich* to support its conclusion that bond conditions necessarily "must be related to ensuring the alien's appearance for deportation." Pet. App. 51a. In placing a limiting construction on the provisions of 8 U.S.C. 1252(d), the *Witkovich* Court noted the indefinite time for which such provisions may be applied and the possibility that a broader construction might deprive aliens of existing First Amendment rights. Neither concern exists here. The regulation challenged in this case applies only during the pendency of deportation proceedings and merely adds an additional disincentive to unauthorized employment that is already illegal. See 8 U.S.C. 1182(a)(14). Moreover, the authority in subsection (a)(1), unlike the authority in subsection (d), is unqualified and contains no language that fairly suggests a limiting construction. See *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989) (quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)); *CFTC* v. *Schor*, 478 U.S. 833, 841 (1986); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964).

torney General's authority to impose conditions on release bonds is limited by the sanctions imposed by IRCA. Those sanctions are addressed to *employers* and are designed to prevent them from hiring, *at any time*, aliens who are not authorized to work in this country. 8 U.S.C. 1324a. Section 1252(a)(1), on the other hand, is addressed to the Attorney General, and authorizes him to impose conditions on bonds in deportation proceedings.[10] Thus, neither section can be read as in any way qualifying the purpose, or scope, of the other. Although the court of appeals accurately described IRCA as a "carefully crafted political compromise" designed to take new steps to fight the problem of employment by illegal aliens, Pet. App. 38a, IRCA was enacted against a backdrop of existing provisions that Congress did not alter. Since the Attorney General's authority to require conditions in release bonds is one such provision, there is no basis for the court of appeals' assertion that it is somehow "contrary to a congressional policy." *Id.* at 47a.[11]

3. The legislative history fully confirms the breadth of the Attorney General's discretion in this

[10] IRCA's employer sanctions are codified in "Part VIII—General Penalty Provisions"; Section 1252(a)(1) is codified in "Part V—Deportation; Adjustment of Status."

[11] Moreover, the "employee sanction" that Congress debated and rejected in the course of enacting IRCA provided jail terms for unauthorized work. See *Immigration Control and Reform Act of 1985: Hearings on S. 1200 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 44-45 (1985); Pet. App. 42a. Those punitive sanctions would have been altogether different from detention under the present regulation—detention that is limited to the duration of deportation proceedings and occurs only if the alien violates the bond condition.

area. Before 1950, the statute permitted release on bond "conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody." 8 U.S.C. 156 (1946). In 1949, Congress considered, but did not enact, a bill, H.R. 10, 81st Cong., 1st Sess., that was intended, among other things, to make it easier for the Attorney General to detain some aliens without bond. See generally *Carlson* v. *Landon*, 342 U.S. 524, 538-541 (1952). That bill would also have amended former 8 U.S.C. 156 to provide that, in the case of release on bond, it would be "among the conditions of any such bond * * * that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending against the charge or charges under which he was taken into custody." The reports of both Houses of Congress on this bill stated:

> The bill further provides that *among the conditions* of any bond exacted, * * * there shall be a condition that the alien shall be produced when required for defense against the charges upon which he appears to be deportable * * *. These provisions, of course, enumerate *only one* of the conditions which is mandatory in the bond * * *. *The bill intends that the Attorney General shall have full discretion in imposing any other conditions or terms in the bond * * * which he may see fit to include.* Thus, a man released on bond might have as a condition of the bond that he also be subject to make periodic reports to the immigration officials as to his whereabouts and furnish other desired information. Or a bond might provide as one of its conditions that upon demand by the Attorney General the existing bond shall be surrendered and a new bond in

> greater or lesser amount or other conditions shall be furnished. *The bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond * * * pending final determination of the deportability of the alien* * * *.[12]

H.R. Rep. No. 1192, 81st Cong., 1st Sess. 6 (1949) (emphasis added); S. Rep. No. 2239, 81st Cong., 2d Sess. 5 (1950) (emphasis added).

Although H.R. 10 did not pass, the bill—as this Court recognized in *Carlson* v. *Landon*, 342 U.S. at 538-539—was the progenitor of Section 23 of the Internal Security Act of 1950, ch. 1024, 64 Stat. 1011. Section 23 specifically amended former 8 U.S.C. 156 to contain the exact language that H.R. 10 would have enacted. In 1952, when Congress comprehensively revised the immigration laws (ch. 477, 66 Stat. 163), former 8 U.S.C. 156 was replaced by Section 242(a) of the new Act, now codified at 8 U.S.C. 1252(a)(1). That is the provision at issue in this case and the one on which INS relied in promulgating the challenged regulation. Although the language in H.R. 10 specifying that "[i]t shall be among the conditions" that the alien appear was not carried into the statute, the legislative history indicates that Section 1252(a)(1), "in general, follows the procedure established by section 23 of the Subversive Activities Control Act of 1950." H.R. Rep. No. 1365, 82d

[12] The House report also stated more generally that one purpose of the bill was to "return without doubt to the political (executive) branch of the Government certain functions in connection with the exclusion and expulsion of aliens which historically have been vested in that branch, rather than the judiciary." H.R. Rep. No. 1192, *supra*, at 4.

Cong., 2d Sess. 57 (1952).[13] The committee reports signal an unmistakable intention to give the Attorney General "full discretion" and "untrammeled authority" to impose conditions other than a condition that the alien be produced for deportation proceedings. What is more, those reports formed the basis for subsequent legislation *repealing* a statutory provision permitting release on bond "conditioned that such alien shall be produced," 8 U.S.C. 156 (1946), and ultimately *replacing* it with one authorizing "such conditions as the Attorney General may prescribe," 8 U.S.C. 1252(a)(1). The legislative history decisively refutes the court of appeals' limitation of the Attorney General's authority.

The court of appeals ignored both Congress's expansion of the Attorney General's statutory authority and the statements of purpose in the committee reports. Instead, in concluding that the Attorney General's discretion was severely limited, the court of appeals relied on the list of illustrative release conditions contained in the passage from the 1949 committee report quoted above. See Pet. App. 77a-78a, 88a-89a; Br. in Opp. 17. Although the examples stated there do relate to ensuring appearance, there is no basis for reading those examples—even apart from the broad statements that accompanied them—as exhausting the wide-ranging authority conferred by the express language of the statute. On the contrary, this Court has recently admonished that "the language of a statute—particularly language expressly granting an agency broad authority—is not to be regarded as modified by examples set forth in

[13] The Subversive Activities Control Act of 1950 is Title I of the Internal Security Act of 1950, and references to Section 23 of either Act are to the same provision.

the legislative history. An example, after all, is just that: an illustration of a statute's operation in practice." *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2677 (1990). Moreover, as noted, the very reports in which these examples appear confirm that the Attorney General was to have "full discretion" and "untrammeled authority to impose such conditions or terms as he sees fit." H.R. Rep. No. 1192, *supra*, at 6; S. Rep. No. 2239, *supra*, at 5.

B. A Condition Forbidding Unauthorized Employment Furthers A Core Purpose Of The Immigration And Nationality Act And Is Therefore Well Within The Attorney General's Discretion

In promulgating the regulation here, INS emphasized that employment-related bond conditions serve "a basic purpose of the immigration laws * * * to protect against the displacement of workers in the United States." 48 Fed. Reg. 51,142 (1983) (quoting *In re Toscano-Rivas*, 14 I. & N. Dec. 523, 555 (A.G. 1974)), Pet. App. 140a. INS explained that the regulation does not interfere with any substantive rights, because it is aimed at "unauthorized work," which is itself "a continuing violation of the immigration laws." *Ibid.*, Pet. App. 139a-140a. The sensible purpose and scope of the regulation bring it well within the Attorney General's authority under 8 U.S.C. 1252(a)(1).

1. It is important to note at the outset the limited nature and intended effects of the regulation at issue. Contrary to the court of appeals' supposition, Pet. App. 7a-13a, INS has consistently maintained that the regulation at issue is not intended to ban *all* employment, but only employment that is "unauthorized." See 48 Fed. Reg. 51,142 (1983), Pet. App. 139a-140a.[14] An alien with permanent resident status is authorized to work as an incident to that status. 8 C.F.R. 274a.12(a)(1), Pet. App. 127a. If INS initiates deportation proceedings against a permanent resident alien, see 8 U.S.C. 1251(a), he may

[14] The court of appeals read the regulation to forbid all work because the body of the regulation did not repeat the caption's description of the regulation as a "[c]ondition against unauthorized employment." Pet. App. 7a. The court then determined that the body of the regulation must be given its "plain meaning" unqualified by the limitation in the caption.

While this determination was not critical to the court of appeals' rationale—as we have noted, the court held that the Attorney General could not condition release even on refraining from *unauthorized* employment—it was, in itself, plainly in error. In the first place, the text of the regulation is not unambiguous, and we believe that its caption *is* relevant to its interpretation. Cf. 2A Sutherland, *Statutes and Statutory Construction* § 47.03, at 121 (N. Singer rev. of C. Sands 4th ed. 1984) (Congress, unlike the English Parliament, "considers and *passes* the entire act including the title, giving authenticity to every component."); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989) (resolving ambiguity "by the title" of the legislation); *FTC* v. *Mandel Bros.*, 359 U.S. 385, 388-389 (1959) ("The Title of the Act * * *, though not limiting the plain meaning of the text, is nonetheless a useful aid in resolving an ambiguity."); *Maguire* v. *Commissioner*, 313 U.S. 1, 9 (1941) ("While the title of an act will not limit the plain meaning of the text, it may be of aid in resolving an ambiguity." (citations omitted)). Moreover, the INS's reading of its own regulation is entitled to deference, and the court of appeals' refusal to accept that reading was altogether improper—especially in light of the fact that the regulation had been struck down on facial, statutory grounds, before INS had an opportunity to implement it. See generally *Martin* v. *OSHRC*, 111 S. Ct. 1171, 1175-1176 (1991) (courts must defer to agency's construction of its own regulations); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (same).

continue to work until resident status is lost. See 48 Fed. Reg. 51,143 (1983), Pet. App. 142a-143a. As detailed in 8 C.F.R. 274a.12(a) and 274.12(b), Pet. App. 127a-132a, numerous other statuses also convey work authorizations, and those authorizations similarly remain in effect during the pendency of deportation proceedings.[15] If an alien is entitled to work by virtue of his status, proof of that fact will be readily available,[16] and the bond condition will not apply.

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[15] Plaintiffs' contention that work authorization automatically lapses upon the initiation of deportation proceedings, Br. in Opp. 8-9, is flatly incorrect. 8 C.F.R. 274a.14(a)(1) provides that certain employment authorizations for which aliens must specifically apply (those set forth in 8 C.F.R. 274a.12(c)) automatically terminate upon the institution of deportation proceedings. However, that provision does not affect the work authorizations incident to status set forth in 8 C.F.R. 274a.12(a) and (b)—including, of course, the work authorization of an alien with permanent resident status. Furthermore, the termination provision does not deprive *any* alien subject to deportation proceedings of the ability to apply for work authorization pending the outcome of those proceedings. See 8 C.F.R. 274a.12(c)(13), Pet. App. 135a-136a (based on 8 C.F.R. 109.1(b)(8) (1987)).

[16] For example, lawful permanent resident aliens are issued "green cards," which they are required to carry with them at all times as evidence of their status. See 8 U.S.C. 1304(e); 8 C.F.R. 211.1(b); *Saxbe* v. *Bustos*, 419 U.S. 65, 68 (1974). Other aliens holding a status authorizing them to work, see 8 C.F.R. 274a.12(a), will have that status "evidenced by an employment authorization document issued by the [INS]." Aliens in a status entitling them to limited work authorization, 8 C.F.R. 274a.12(b), will generally have that status reflected in a visa. Moreover, each alien's evidence of registration has an "A" number, which can be given to INS to ascertain the alien's status. Thus, an alien who is permitted to work should have no difficulty demonstrating that fact to INS officials responsible for releasing the alien on bond.

The regulation affects only those aliens whose status does not authorize them to work—typically, aliens who have entered this country illegally and are deportable, but who seek discretionary relief such as suspension of deportation under 8 U.S.C. 1254. Those aliens have no right to work in this country. See 8 U.S.C. 1182(a)(14); *Doe* v. *Reivitz*, 830 F.2d 1441, 1450 n.16 (7th Cir. 1987). Accordingly, the regulation conditions their release on their refraining from unauthorized employment during the pendency of deportation proceedings. While such aliens may seek discretionary work authorization,[17] and may en-

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Admittedly, there may be rare cases where unusual circumstances make it difficult to ascertain status. See, *e.g.*, *Liacakos* v. *Kennedy*, 195 F. Supp. 630 (D.D.C. 1961) (factual dispute regarding place of birth, where no birth certificate could be found). However, one of the factors guiding the grant of interim work authorization under the challenged regulation is whether "legal status may ensue in the future." 8 C.F.R. 274a.12(c)(13)(iii). Accordingly, as INS noted previously in an operating instruction issued to its personnel, "[i]ndividuals maintaining a colorable claim to U.S. Citizenship" will normally not be subject to the condition. See Addendum Exhibit A, Defendants' Memorandum of Points and Authorities in Support of Motion for Summary Judgment, C.R. 44 (Sept. 7, 1984). Finally, even if it were possible that, on rare occasions, the regulation might temporarily deprive an individual of work authorization to which he in fact had a right, that would not justify the invalidation of the regulation on its face, on either statutory or constitutional grounds. See *American Hospital Ass'n* v. *NLRB*, No. 90-97 (Apr. 23, 1991), slip op. 12; cf. *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976) (due process requirements are shaped by "the generality of cases, not the rare exceptions").

[17] The regulation empowers the district director to grant work authorization pending deportation proceedings to avoid

joy discretionary release on bond, INS has properly refused to condone the "continuing violation of the immigration laws" that occurs if they work without authorization while their deportation proceedings are pending. See 48 Fed. Reg. 51,142 (1983), Pet. App. 139a.

2. Since, as we have shown, the Attorney General's discretion under Section 1252(a)(1) is not confined to ensuring the alien's appearance for deportation hearings,[18] employment-related conditions of the kind required by the "no unauthorized work" regula-

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hardship to other persons or where there is a "reasonable basis for discretionary relief." See 8 C.F.R. 274a.12(c)(13), Pet. App. 135a-136a (formerly 8 C.F.R. 109.1(b)(8) (1984)); see also 8 C.F.R. 274a.12(c)(9) and (10), Pet. App. 134a-135a (specifically providing for discretionary work authorizations for persons who have sought suspension of deportation under 8 U.S.C. 1254 or adjustment of status under 8 U.S.C. 1255). Similarly, any alien who has filed a non-frivolous application for asylum may obtain interim work authorization under 8 C.F.R. 274a.12(c)(8), Pet. App. 134a, and 8 C.F.R. 208.4. We recognize, of course, that not all aliens will qualify for authorization under those provisions. Aliens who do not qualify for discretionary work authorization are in no worse position than any other visitor to this country who is not legally entitled to work; they must depend upon their existing resources, their family and friends, or charity while INS determines their eligibility for discretionary relief.

[18] The panel majority in the court below, citing the Ninth Circuit's earlier ruling in *Flores* v. *Meese*, *supra*, acknowledged that a regulation need not have "the *sole* purpose of ensuring appearance." Pet. App. 22a-23a. But the majority then proceeded to read the *Flores* case so narrowly that the only circumstance in which the majority might possibly countenance any employment-related bond condition would be in the unlikely event that such a condition either helped to ensure the alien's appearance at a future hearing or served to protect the public safety or national security.

tion are plainly valid. These conditions further a core purpose of the Immigration and Nationality Act: to protect the jobs of United States citizens and permanent resident aliens. "One of the main reasons [aliens] come [to the United States illegally]—perhaps *the* main reason—is to seek employment." *INS* v. *Delgado*, 466 U.S. 210, 223 (1984) (Powell, J., concurring). "A primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 893 (1984).

The Immigration and Nationality Act governs all aspects of admission of aliens to the United States. See H.R. Rep. No. 1365, 82d Cong., 2d Sess. 27 (1952). See generally *Elkins* v. *Moreno*, 435 U.S. 647, 664-665 (1978). Among other requirements, it conditions the entry of aliens on compliance with limitations related to employment in the United States, thus reflecting Congress's consistent policy to

> provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country.

H.R. Rep. No. 1365, *supra*, at 51.[19]

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[19] In earlier rulings in this case, the courts below relied on statements in this Court's opinions in *Sure-Tan*, *supra*, and *DeCanas* v. *Bica*, 424 U.S. 351 (1976), in concluding that employment is only a "peripheral" concern of the immigration laws. See Pet. App. 79a, 91a-92a; see also *id.* at 70a. The point of those statements, however, was a more limited one—that the concern of the INA with employment is "peripheral" only in the sense that the INA was not meant to preempt other laws (state and federal) regulating employment generally. See *DeCanas*, 424 U.S. at 360-361; *Sure-Tan*, 467 U.S. at 892-893. Moreover, as noted above, the Court went on,

To implement this policy, the Act conditions entry of each immigrant alien who intends to work in the United States—with the exception of close relatives of U.S. citizens and lawful permanent resident aliens [20]—on the issuance by the Secretary of Labor of a certificate entitling the alien to engage in such work. 8 U.S.C. 1182(a)(14). Aliens who seek to enter the United States for the purpose of engaging in unauthorized employment are excludable, and those who violate the terms and conditions of their entry by engaging in unauthorized employment are deportable. 8 U.S.C. 1182(a)(14), 1251(a)(1) and (9); 8 C.F.R. 214.1(e).[21]

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in *Sure-Tan*, to recognize that "a primary purpose in restricting immigration is to preserve jobs for American workers." 467 U.S. at 893-894.

[20] Section 1182(a)(14) states that it "shall apply to preference immigrant aliens described in section 1153(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(7) of this title." The immigrant aliens to which this sentence refers include all immigrants who may be allotted visas under the numerical limitations, except the relatives of citizens or permanent residents specifically listed in 8 U.S.C. 1153(a)(1), (2), (4) and (5).

[21] 8 U.S.C. 1182(a)(14) provides for the exclusion of (and hence, under 8 U.S.C. 1251(a)(1), authorizes the deportation of)

> [a]liens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified * * * that (A) there are not sufficient workers who are able, willing, qualified * * * and available * * * to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

This provision, which applies to all would-be immigrants except for certain persons allowed to enter as relatives of United States citizens or those seeking political asylum, is intended to "provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor." H.R. Rep. No. 1365, *supra*, at 51.

The Act also regulates entry by nonimmigrant aliens—*i.e.*, those seeking to enter on a visa for limited time periods. See 8 U.S.C. 1101(a)(15); 8 C.F.R. 214.1(e). For the vast majority of such aliens, employment is either barred entirely, or is limited by the terms of the visa. For example, representatives of the foreign news media may enter the United States "solely to engage in such vocation." 8 U.S.C. 1101(a)(15)(I). Only narrow categories of temporary visa-holders are given unrestricted employment authorization. See 8 C.F.R. 274a.12(a).

Congress's intent to protect American labor has been expressed repeatedly, and the protections have been increased in successive amendments to the Act. In 1965, Congress shifted primary responsibility for obtaining certification from the Secretary of Labor to the immigrant seeking such clearance. Pub. L. No. 89-236, § 10(a), 79 Stat. 917-918. One stated intent of the amendment was to "strengthen[]" controls to protect the American labor market from an influx of both skilled and unskilled foreign labor." S. Rep. No. 748, 89th Cong., 1st Sess. 15 (1965). In 1976, Congress provided, in 8 U.S.C. 1255(c)(2), that (with limited exceptions) aliens could not become permanent residents if they accepted unauthorized employment before filing their applications for adjustment of status. Pub. L. No. 94-571, § 6, 90 Stat. 2705-2706. The House Committee report explained that this modification would "deter many nonimmigrants from violating the conditions of their admission by obtaining unauthorized employment." H.R. Rep. No. 1553, 94th Cong., 2d Sess. 12 (1976).

Most recently, Congress stressed the centrality of employment concerns to its immigration policies by enacting the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. The "centerpiece" of IRCA is its addition to the INA of a provision imposing sanctions on employers of aliens who are not authorized to work in this country. 8 U.S.C. 1324a; see H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 46, 56 (1985); 132 Cong. Rec. 31,640-31,641 (1986) (remarks of Rep. Bryant). The express goal of the sanctions system is to deter illegal entry by elminating the economic incentive of possible employment. H.R. Rep. No. 682, *supra*, at 46, 56; see *Patel* v. *Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988), cert. denied, 489 U.S. 1011 (1989). Congress plainly recognized the direct link between even the *possibility* of employment in the United States and the strong lure of illegal entry:

> The primary incentive for illegal immigration is the availability of U.S. employment.
>
> * * * * *
>
> As long as greater job opportunities are available to foreign nationals who succeed in physically entering this country, intense illegal immigration pressure on the United States will continue. This pressu[r]e will decline only if the availability of U.S. employment is eliminated, or the disparity in wages and working conditions is reduced * * *.

S. Rep. No. 132, 99th Cong., 1st Sess. 1, 8 (1985). The debates on IRCA are replete with references to unauthorized employment as the "lure" or "magnet" that induces aliens to enter the Nation in violation of

our laws.[22] And since Congress recognized that intercepting or locating all illegal aliens is extremely difficult, see S. Rep. No. 132, *supra*, at 7-8, it concluded that the only realistic solution to the problem of illegal immigration is to prevent illegal aliens from working. Employer sanctions serve this purpose, by

> announc[ing] a single and clear message to the world that you should not come here expecting to find a job because, when you get here, you will find that it is illegal to hire you.

132 Cong. Rec. 29,990 (1986) (remarks of Rep. Bryant).

Congress also made clear, during the consideration of IRCA, that one of the preeminent reasons for imposing sanctions and stemming the tide of illegal entrants was to protect the job opportunities of American citizens and lawful immigrant aliens. As one Senator stated bluntly,

> too many Americans, especially young Americans, are out of work[.] * * * [I]t is fundamentally unfair for people who have broken our laws and entered the United States illegally to hold a job at the expense of an American.

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[22] See, *e.g.*, 131 Cong. Rec. 24,306 (1985) (remarks of Sen. Mattingly) ("[T]he promise or even the hope of employment and the economic gain that employment will bring is the strongest lure drawing [aliens] across the border"); 132 Cong. Rec. 29,988 (1986) (remarks of Rep. Mazzoli) ("These people do not come to the United States for our spectacular vistas, our climate, or our clean air. They come to work and to improve their lot in life. As long as work is available, they will continue to come."); see also 131 Cong. Rec. 24,308 (1985) (remarks of Sen. Hatfield); 132 Cong. Rec. 29,981, 29,987, 29,993, 30,009, 30,053 (1986) (remarks of Reps. Rodino, Fish, Berman, Lowery, Scheuer).

131 Cong. Rec. 23,709 (1985) (remarks of Sen. Hawkins). Congress recognized that illegal immigrants take jobs from American citizens and lawful resident aliens, and that the harshest impact is on "low-income, low-skilled Americans, who are the most likely to face direct competition." S. Rep. No. 132, *supra*, at 5; see H.R. Rep. No. 682, *supra*, Pt. 1, at 47. Throughout the debates, Members of both Houses of Congress voiced their concern that illegal immigrants are "taking the jobs of Americans." [23]

In enacting IRCA, Congress also explicitly disavowed the theory that illegal immigrants take only "menial" jobs that American workers do not want and will not take. The Senate committee report, for example, noted that many illegal aliens are in higher-paying jobs, and that many "menial" jobs could be filled by unemployed Americans if employers made an effort to publicize them instead of filling them with illegal aliens. S. Rep. No. 132, *supra*, at 6. As one Senator further stated,

> There is no question that we have substitutions. The most conservative estimate I have seen is that 65 percent of those who come into our country illegally take the jobs of Americans. They take the jobs of low-skilled Americans, generally * * * [that] means 81,000 jobs for the City of Chicago. That is a lot of jobs. Nationally, it is a major problem.

132 Cong. Rec. 33,212-33,213 (1986) (remarks of Sen. Simon).

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[23] 132 Cong. Rec. 29,991 (1986) (remarks of Rep. Smith); see also 131 Cong. Rec. 23,747, 24,307 (1985) (remarks of Sens. Bentsen, Bumpers); 132 Cong. Rec. 30,004 (1986) (remarks of Rep. Fields); 132 Cong. Rec. 33,212-33,213, 33,224-33,225 (1986) (remarks of Sens. Simon, Wilson).

There can be no doubt, then, that the displacement of American workers *is* one of the primary concerns of the immigration laws, that Congress *does* believe that such displacement is a widespread problem, and that Congress has sought to prevent displacement of American workers by those who have come to this country illegally. Those are precisely the policies that the Attorney General has sought to advance through the regulation at issue here. Where an alien who has been arrested for purposes of deportation is unable to establish, through any of a number of reliable and readily-available means, that he or she is authorized by law to work in this country, there is good reason not to allow that person to take a job that might otherwise go to one who is entitled to work.

C. The Attorney General's Interpretation Of His Statutory Authority Merits Substantial Deference

The Attorney General's interpretation of 8 U.S.C. 1252(a)(1) is owed considerable deference and should be upheld if it represents a "permissible" construction of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The deference due the Attorney General's interpretation of 8 U.S.C. 1252(a)(1) is reinforced by 8 U.S.C. 1103(a). This section, which confers on him broad rulemaking authority in carrying out his statutory duties under the INA (see note 5, *supra*), is an explicit indication that Congress intended the Attorney General to "fill any gap left" in the statute. See *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974).

As the court of appeals noted, Pet. App. 34a-37a, INS did not impose work-related bond conditions prior to the mid-1970s, and then did so only on a

case-by-case basis prior to the promulgation of the regulation at issue. Thus, the present regulation represents a change in the Attorney General's *policy* regarding release conditions, but this shift does not reflect a change in the Attorney General's interpretation of his statutory authority. On the contrary, the Attorney General's view of the *statutory* question posed here has remained the same ever since he first considered it in 1974. In *In re Toscano-Rivas*, 14 I. & N. Dec. 523, 553 (A.G. 1974), the Attorney General concluded that the Act authorizes employment-related conditions:

> The pertinent statutory provisions authorize, in at least some circumstances, the inclusion in appearance-and-delivery bonds of conditions which bar unauthorized employment. However, the use of such conditions should be specifically governed by a published regulation of the Service.[24]

Such a regulation has now been promulgated.

This Court has recognized that the very nature of administrative discretion requires that agencies be permitted to alter policies, within statutory bounds, to accommodate "changing needs." See *American Trucking Ass'ns, Inc.* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967). INS's decision to tighten the policy on release conditions—based on the agency's reassessment of the vexing problem of unlawful employment by aliens—falls well within the broad authority provided by the INA.

[24] The Attorney General did not, in *Toscano-Rivas*, assert an unlimited authority to impose release conditions. Instead, relying on the legislative history of the INA, he concluded:

> It would be unreasonable to construe the quoted language to mean that the Attorney General may impose bond conditions which are totally unrelated to the *various purposes of the immigration laws*, but the reports clearly demonstrate a Congressional intent to grant wide discretion otherwise.

14 I. & N. Dec. at 554 (emphasis added). This position is, of course, the same as that advanced in the present case—*i.e.*, consistent with the overall statutory scheme, release conditions may be used to further any of the substantive policies of the immigration laws.

II. THE IMMIGRATION AND NATIONALITY ACT PERMITS THE ATTORNEY GENERAL TO IMPOSE RELEASE CONDITIONS THROUGH RULES OF GENERAL APPLICATION

After holding that the INA does not authorize a bond condition forbidding unauthorized employment, Pet. App. 47a, 54a, the court of appeals went on to hold that a "blanket" condition would be impermissible "even if unauthorized employment were grounds for detention," *id.* at 57a; see *id.* 17a-18a, 26a-32a, 54a-58a; see also *id.* at 80a, 105a-106a. In so holding, the court of appeals erred both in its characterization of the regulation and in its legal analysis.

A. The court of appeals' characterization of the regulation as imposing a "blanket" condition, Pet. App. 17a-18a, ignores two sets of individualized determinations contemplated by the regulation: an initial, informal determination whether the alien holds some status that makes work "authorized," and a second determination whether, in the absence of a showing of such preexisting authorization, individual factors indicate the appropriateness of temporary work authorization in the particular instance.

As explained above, INS has consistently maintained that the regulation applies only to unauthorized employment—*i.e.*, to arrested aliens whose status does not confer work authorization. See 8 C.F.R. 274a.12(a), 274a.12(b), Pet. App. 127a-132a. Because an alien's status can be readily verified by re-

quired documentation at the time of arrest, and before the initial action setting bond (see note 16, *supra*), the condition will not be applied at all to aliens authorized to work.[25]

In addition, the regulation expressly provides for individualized proceedings, following the initial imposition of the bond condition, in which the alien can request work authorization from the district director for the duration of the deportation proceedings. 8 C.F.R. 103.6(a)(2)(iii), 247a.12(c)(13), Pet. App. 123a, 132a, 135a-136a. This provision is intended chiefly to grant discretionary relief to those persons—such as deportable aliens seeking suspension of deportation—who would otherwise have no claim to work authorization.[26] Relief is available upon a showing that the alien will likely be permitted to remain in this country, that others are dependent

[25] While the regulation does not expressly refer to the availability of such initial determinations, they are inherent in the published intention of INS to apply the bond condition only to "unauthorized" employment, and this intention in turn is consistent with the reference in the regulation's caption to a "[c]ondition against unauthorized employment." 48 Fed. Reg. 51,142 (1983), Pet. App. 139a-140a; 8 C.F.R. 103.6(a)(2)(ii), Pet. App. 123a. Thus, contrary to the court of appeals' conclusions that the regulation applies to all employment (authorized or not), Pet. App. 7a-10a, and that the regulation permits relief from the "blanket condition" only "at some later time," Pet. App. 17a-18a, INS's reasonable construction of the regulation provides for appropriate relief from the outset. See note 14, *supra*.

[26] The provision can also be invoked in those rare cases where an alien claims work authorization by status but is unable readily to document such status. In such cases, a preliminary showing of likely success on the merits of such a claim would be grounds for temporary relief. See 8 C.F.R. 274a.12(c)(13)(iii), Pet. App. 136a.

upon him for support, or that "other equities exist." *Ibid.* Even though the alien bears the burden of establishing the appropriateness of this discretionary relief, he will receive interim work authorization unless the district director makes an adverse adjudication within 60 days of the date of application. 8 C.F.R. 274a.13(d).

B. The court of appeals' requirement of "individualized determinations" lacks any basis in the statutory text. The court stated that the Attorney General's discretion regarding release of aliens on bond "must be exercised on the specific, individual circumstances" of the alien in question. Pet. App. 32a; see *id.* at 57a ("[t]he exercise of discretion under the statute must be based on specific facts regarding the individual related to reasons why he is a poor risk for enlargement upon bail or may endanger the nation while he is at liberty"). The court did not even attempt to anchor this requirement in the language of the statute. The INA itself does not contain *any* language requiring a hearing of any sort on bond determinations.[27] It merely gives the Attorney General discretion to impose "such conditions as [he] may prescribe" on release on bond. The statute is silent as to whether such conditions should be "prescribed" in individualized proceedings or "prescribed" by rule. Under well-established principles, INS is free to act through individualized proceed-

[27] The statute's only express provision regarding hearings is that making habeas corpus proceedings in district court available to arrested aliens. 8 U.S.C. 1252(a)(1). Such proceedings, however, are limited to the grant of relief "upon a conclusive showing * * * that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances."

ings, or by rule, at its discretion. See generally *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). There is simply no warrant for the lower court's conclusion that the statute requires INS to address each and every issue regarding bond conditions in individualized proceedings.

C. Even if some sort of individualized hearing requirement were implicit in 8 U.S.C. 1252(a)(1), the regulation at issue here would be fully consistent with such a requirement. This Court has held that, notwithstanding language requiring a "hearing" or otherwise specifying that an administrative agency must render a decision "in each case," federal agencies may "rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority." *American Hospital Ass'n* v. *NLRB*, No. 90-97 (Apr. 23, 1991), slip op. 5; see *Heckler* v. *Campbell*, 461 U.S. 458, 467 (1983); *FPC* v. *Texaco, Inc.*, 377 U.S. 33, 44 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). As Judge Friendly reasoned, in a case involving another section of the INA,

> We are unable to understand why there should be any general principle forbidding an administrator, vested with discretionary powers, to determine by appropriate rulemaking that he will not use it in favor of a particular class on a case-by-case basis, if his determination is founded on considerations rationally related to the statute he is administering.

Fook Hong Mak v. *United States*, 435 F.2d 728, 730 (2d Cir. 1970).

The INA expressly provides the Attorney General with broad authority to "establish such regulations

* * * as he deems necessary for carrying out his authority under [the INA]." 8 U.S.C. 1103(a). As the Court recently observed in *American Hospital Ass'n* v. *NLRB*, broad language of this sort is "unquestionably sufficient" to authorize rules directing the manner in which statutory discretion is to be exercised, "unless limited by some other provision in" the statute in question. Slip op. 2-3. As noted above, no such limitation exists.

The question of the Attorney General's rulemaking power in this case thus turns entirely on the scope of his authority to impose employment-related conditions in release bonds. As explained in Point I, *supra*, the rule under challenge represents a policy decision that, in the absence of special hardship or other equities, illegal employment by aliens against whom deportation proceedings are pending should be forbidden because it threatens to take jobs away from American citizens and others in this country legally. See 48 Fed. Reg. 51,143 (1983), Pet. App. 142a. The Attorney General could, of course, have chosen to address such issues anew in each individual proceeding, inquiring in each case as to the likelihood that the illegal employment of a particular alien would have an adverse effect on employment opportunities. But the decision not to do this—and to rely instead on a general rule, based on the proposition that unlawful employment tends to reduce opportunities for lawful employment—is well within the competence and authority of the INS.[28] As this Court

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[28] INS's determination, rooted in its own experience with immigration issues, is supported by the conclusions of Congress itself, in its 1986 enactment of IRCA, that illegal employment of aliens takes jobs away from American citizens, particularly "low-income, low-skilled Americans, who are the

recognized in *FPC* v. *Texaco, Inc.*, 377 U.S. at 44, it would be wholly inappropriate to impose on agencies an obligation to address in individual proceedings general policy issues that are better suited to decision by rule:

> To require the Commission to proceed on a case-by-case basis would require it, so long as its policy [remained in effect], to repeat in hearing after hearing its conclusions that [are applicable in each]. There would be a vast proliferation of hearings * * *. We see no reason why under this statutory scheme the processes of regulation need be so prolonged and so crippled.

Ibid. (citations and footnote omitted); see *American Hospital Ass'n*, *supra*, slip op. 5 ("even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability").

The court of appeals offered no reason why the policy choice embodied in the challenged regulation is improper under the INA, other than its own *ipse dixit* that bond conditions *must* be based on individual proceedings, unaffected by rule. Its holding on

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most likely to face direct competition." S. Rep. No. 132, *supra*, at 5; see p. 32, *supra*.

In holding it improper to address these issues by rule, the court of appeals relied on lower court decisions involving denials of bail to individuals claimed to be subversive or otherwise to pose risks to the national security. Pet. App. 25a-33a; see *id.* at 49a-54a. Those cases, however, are inapposite. Whether a particular individual is a security risk is admittedly an inquiry to which individualized hearings are well-suited and perhaps essential. The employment concerns addressed here, by contrast, are policy matters peculiarly well-suited to decision by rule.

this point—like its holding that employment concerns cannot, by themselves, justify the imposition of bond conditions—finds no support in the language or policies of the INA, and improperly restricts the discretion of the Attorney General under that statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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